(2)

No. 91-780

Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. CURTIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
MARC RICHMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the courts below correctly held that the United States is not liable under Georgia law and the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages resulting from an airplane crash alleged to be caused by the negligent overhaul of a private airplane by a private mechanic whose sole connection to the federal government was a certification from the Federal Aviation Administration.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Berkovitz v. *United States*, 486 U.S. 531 (1988)	6
Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985)	3
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	5
G.D. Searle & Co. v. *Cohn*, 455 U.S. 404 (1982)	5
Moody v. *United States*, 774 F.2d 150 (6th Cir. 1985), cert. denied, 479 U.S. 814 (1986)	3
Roberson v. *United States*, 382 F.2d 714 (9th Cir. 1967)	3
S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. *United States*, 692 F.2d 1205 (9th Cir. 1982), rev'd, 467 U.S. 797 (1984)	5
Sellfors v. *United States*, 697 F.2d 1362 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984)	4
United Scottish Insurance v. *United States*, 692 F.2d 1209 (9th Cir. 1982), rev'd, 467 U.S. 797 (1984)	5

Statutes:

28 U.S.C. 2680(a)	6
49 U.S.C. App. 1421(a)	4
49 U.S.C. App. 1421(a)(3)	2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-780

WILLIAM H. CURTIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A27) is unreported, but the judgment is noted at 943 F.2d 1318 (Table). The opinion of the district court (Pet. App. A17-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 15, 1991. A petition for rehearing was denied October 16, 1991 (Pet. App. A28-A30). The petition for a writ of certiorari was filed November 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to 49 U.S.C. App. 1421(a)(3), the Federal Aviation Administration (FAA) sets minimum standards for airplane servicing. On August 3, 1987, the FAA took administrative action against John Stroup, an FAA-certified mechanic employed by a private party, for "failing to use proper maintenance techniques and procedures" and for "making several fraudulent entries in his maintenance log." Pet. App. A18. In September 1987, Stroup overhauled a plane owned by John and Linda Goff, for which he issued a certificate of airworthiness on October 1, 1987. On October 2, 1987, the FAA revoked Stroup's certification as an airplane mechanic, based on the items noted in the August 3, 1987 notice. On December 6, 1987, the Goffs were killed in a crash of the plane in Georgia. *Ibid.*

2. Petitioners, the personal representatives of the Goffs, filed suit against the United States in the United States District Court for the Northern District of Georgia, contending that the FAA breached a duty owed to the Goffs when it failed to revoke Stroup's certification immediately on August 3, 1987, and that the FAA was negligent when it failed to notify the Goffs that Stroup's certification had been revoked on October 2, 1987. Pet. App. A1-A13.

The United States filed a motion to dismiss, contending that it owed no duty to the Goffs. Applying Georgia law, the district court agreed and accordingly dismissed the case for failure to state a claim. Pet. App. A17-A24. First, it rejected petitioners' claim that the United States owed a duty under the Good Samaritan doctrine, explaining that the doctrine does not require a defendant to take remedial measures when it does not create the hazardous sit-

uation and, alternatively, that petitioners had failed to allege facts showing that the Goffs relied on actions of the FAA. *Id.* at A21-A23. Second, it rejected petitioners' argument that the United States was responsible for Stroup's negligence because it controlled Stroup, on the ground that petitioners had failed to show that the United States or the FAA had any control over Stroup. *Id.* at A23.

3. On appeal, the court of appeals affirmed without opinion. Pet. App. A27.

ARGUMENT

1. Although the petition presents a number of proposed grounds for review, the only issues properly before this Court are the Georgia-law tort questions discussed above. These were the only grounds raised by petitioners in response to the government's motion to dismiss. See Pltf. Br. in Opp. to Def't Mot. to Dismiss 11-25. Both of the lower courts agreed that petitioners could not prevail, and the propriety of the district court's interpretation of Georgia law does not warrant further review by this Court. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

In any event, the lower courts' application of Georgia law was correct. Petitioners' argument based on the "good samaritan" theory cannot prevail because the FAA did not undertake to provide any services to petitioners' decedents. That theory does not go so far as to provide for liability when governmental conduct is undertaken only for the benefit of the government or the general public. See, *e.g.*, *Moody* v. *United States*, 774 F.2d 150, 156-157 (6th Cir. 1985), cert. denied, 479 U.S. 814 (1986); *Roberson* v. *United States*, 382 F.2d 714, 721 (9th Cir. 1967).

As the district court noted, the undisputed facts established that "the F.A.A.'s 'undertaking' to certify the mechanic was [not] for [the Goffs'] specific or individual benefit." Pet. App. A22.

Moreover, under Georgia law, "where one does not create the dangerous situation and takes no remedial measures, he is not liable as a good samaritan." *Sellfors* v. *United States*, 697 F.2d 1362, 1368 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984). Because petitioners alleged that the dangerous condition was created by the mechanic (see Pet. App. A3-A4), it is clear that the United States did not create the condition, and thus cannot be liable for it under Georgia law. See Pet. App. A22-A23.

Petitioners' control theory is even less well grounded. Petitioners alleged no facts to support the contention that the United States controlled Stroup in any normal sense of the word. He did not work for the United States; he did not work at a facility owned or controlled by the United States; and the United States did not inspect his work. He was merely certified by the United States to have met minimal standards of competence. See 49 U.S.C. App. 1421(a). If the control inherent in failing to revoke a license could give rise to liability on the part of governmental authorities, then every governmental authority issuing licenses—to doctors, lawyers, or to ordinary motor vehicle operators—would face potentially overwhelming liability. The district court properly distinguished the Georgia case relied upon by petitioners, in which a psychiatric hospital was held liable for a homicide committed when it improperly released a dangerous patient on a weekend furlough. See Pet. App. A23.[1]

[1] Petitioners also apparently suggest other theories based on Georgia tort principles (Pet. 20-21), but those arguments

2. Petitioners also contend (Pet. 9-18) that their action can be maintained as a private right of action arising out of the FAA's governing statutes. This contention does not warrant this Court's review. To our knowledge no federal court of appeals has recognized a private right of action against the FAA in favor of an injured party arising out of the FAA's failure to suspend a mechanic's license.[2] In any event, because this argument was neither presented to nor addressed by the district court, and was not addressed by the court of appeals in its summary affirmance of the district court's ruling, it is not appropriate for review in this Court. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

---

were not addressed by either of the courts below and thus are not suitable for review in this Court. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

[2] Petitioner claims without citation (Pet. 20) that the decision of the court of appeals "is in direct contradiction of the Ninth Circuit's holding on the same issue." Apparently the petition refers to *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* v. *United States*, 692 F.2d 1205 (9th Cir. 1982), rev'd, 467 U.S. 797 (1984), and to *United Scottish Insurance* v. *United States*, 692 F.2d 1209 (9th Cir. 1982), rev'd, 467 U.S. 797 (1984), both of which are cited at Pet. 18. Neither of those cases presents the issue addressed by the petition—whether there can be an implied right of action based on the FAA's negligence in failing to withdraw a mechanic's license. Instead, those cases address the question whether there can be an action under the FTCA based on the FAA's negligence in inspecting an aircraft, an act much more directly related to injuries caused by a plane crash than the acts involved in this case. See *Varig Airlines*, 692 F.2d at 1207; *United Scottish Insurance*, 692 F.2d at 1211.

3. Petitioners also contend (Pet. 21-22) that the decision below is inconsistent with *Berkovitz* v. *United States*, 486 U.S. 531 (1988), arguing that *Berkovitz* establishes that a private person injured by an agency's negligent violation of its internal procedures can "under some sets of facts" (Pet. 22) recover under the Federal Tort Claims Act. Putting aside the fact that petitioners did not rely on *Berkovitz* in the court of appeals, this argument is meritless. *Berkovitz* establishes only that there are some circumstances in which the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), will not protect a federal agency from an FTCA claim based on negligent violation of a duty to follow its own procedures. See 486 U.S. at 540-548. *Berkovitz* sheds no light on the question whether such a duty existed or was violated in this case.

4. Finally, petitioners contend (Pet. 22-25) that the trial court erred in dismissing this case on a motion to dismiss, without allowing any discovery; petitioners essentially contend that the decision rested on incorrect factual findings. This contention is meritless. The trial court correctly noted (Pet. App. A19) that it was obligated to "accept [petitioners'] allegations as true" and proceeded to dispose of the case on the basis of the facts alleged in petitioners' complaint. Petitioners offer no reason to believe that the trial court's interpretation of the factual allegations of the complaint raises any issue that would warrant review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
MARC RICHMAN
Attorneys

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45257